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August 12, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Hand Delivered

Re: Reply Comments of Telstra, Inc.
IB Docket No. 97-142

Dear Mr. Caton:

Transmitted herewith, on behalf of Telstra, Inc., are an original and four copies of its comments in the above-referenced proceeding.

If there are any questions concerning this matter, please contact me.

Very truly yours,

R. Edward Price

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 97-142
Rules and Policies on Foreign Participation	)	
in the U.S. Telecommunications Market	)	

REPLY COMMENTS OF TELSTRA, INC.

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TABLE OF CONTENTS

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REPLY COMMENTS OF TELSTRA, INC.

Telstra, Inc. (TI), by its attorneys, hereby submits these reply comments in the above-captioned proceeding.

I. Introduction and Summary

TI supports the Commission's general proposal to eliminate its effective competitive opportunities (ECO) test following the World Trade Organization (WTO) agreement on basic telecom services. As many commenters have pointed out, however, some of the "competitive safeguards" with which the Commission seeks to replace the ECO test are counterproductive (i.e., anticompetitive) and appear to violate U.S. treaty obligations under the General Agreement on Trade in Services (GATS).[1] Thus, sound telecom policy and legal reasoning, as well as consideration of international comity, suggest that the Commission should rethink two

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[1] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167 (1995) [hereinafter GATS]. The GATS establishes a framework agreement for liberalizing trade in services with annexes on specific services and schedules of commitments for each signatory. The WTO agreement on basic telecoms thus comprises the specific Schedules of Commitments on telecommunication services tendered by approximately 65 signatories, as well as the general provisions of the GATS.

major aspects of its proposed entry rules for foreign carriers.

First, the Commission should eliminate its proposed "no special concessions" requirement[2] or clarify it to make it consistent with the agency's proposed policy on alternative settlement arrangements. As proposed, the new "no special concessions" requirement would unreasonably restrict the competitive offerings of foreign affiliated carriers from WTO members that have "market power" in their home countries. This discriminatory treatment of foreign carriers would harm U.S. consumers; violate the Most-Favored-Nation (MFN) and National Treatment principles contained in the GATS; and is at odds with the FCC's simultaneously announced support for alternative settlement arrangements between carriers from WTO member countries.[3]

Second, the Commission should not impose benchmark settlement conditions[4] on carriers from WTO member countries because they violate the Market Access, MFN and National Treatment principles of the GATS. Requiring foreign or foreign-affiliated U.S. carriers to satisfy the FCC's benchmarks could bar foreign carriers from more than 90% of

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[2] See Foreign Participation Notice ¶¶ 114-18.

[3] Contrast paragraph 152 of the Foreign Participation Notice, which presumes that an alternative payment arrangement between affiliated carriers from WTO countries is in the public interest, even if the foreign carrier has market power, and paragraph 117 of that same notice, which proposes to define a preferential accounting rate arrangement by a U.S. carrier as an unlawful "special concession" under Section 63.14 of the rules. See also Regulation of International Accounting Rates, CC Docket No. 90-337, Phase II, Fourth Report and Order, FCC 96-459 (released Dec. 3, 1996) [hereinafter Flexibility Order].

[4] See Foreign Participation Notice ¶¶ 8, 33, 38, 109, 119-21; International Settlement Rates, IB Docket No. 96-261, Notice of Proposed Rulemaking, FCC 96-484 (released Dec. 19, 1996) [hereinafter Benchmarks Notice].

WTO member states from serving their home markets, thus imposing an impermissible barrier to market entry. Given the leading role the United States has played in bringing the WTO telecom negotiation to a successful conclusion, it would be ironic — and an open invitation to trade retaliation — for the FCC now to cut back on the market access previously permitted to foreign carriers.[5] The FCC should reconsider its course and grant Section 214 authorizations to carriers from WTO member countries without any accounting rate conditions.

Finally, as the number of competing U.S. facilities-based carriers approaches the 200 mark,[6] TI reiterates the importance of protecting the due process rights of all market participants. To that end, the FCC should promptly revise its public notice requirements for carrier petitions seeking approval of alternative settlement arrangements and for ISP "modifications."[7]

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[5] While AT&T estimates that but 20% of WTO members might meet the ECO test by January 1998, see AT&T Comments at 3, 54, Telefónica Internacional de España has estimated that over 90% of WTO members may fail to meet the FCC's proposed settlement benchmark by January 1998, see Telefónica Internacional de España Comments at 2, 6. It is hard to understand how an FCC regulation that could bar services by carriers from an additional 70% of WTO member states can be characterized as a "new open entry policy," Foreign Participation Notice ¶ 6, or compliant with the GATS.

[6] Over 170 facilities-based U.S. carriers are listed (as of 1 June, 1997) in New International Carriers 1997/98 — Americas Edition (TeleGeography, Inc., Washington, D.C. 1997). This is more than double the number of such carriers in mid-1996, and FCC public notices indicate that several additional applications by facilities-based international carriers are being filed each week.

[7] See infra pp. 10-11.

II. The Commission's Proposed "No Special Concessions" Requirement Should Be Eliminated Or, Alternatively, Modified

In the Foreign Participation Notice, the Commission proposes to allow foreign carriers from WTO countries to enter the U.S. international services market, but only if they agree to the agency's existing "no special concessions" requirement.[8] This prohibition on special concessions would extend to U.S. carriers with foreign affiliates that have "market power" in their home countries.[9] According to the FCC, Section 63.14 would from now on be interpreted to bar any "exclusive arrangements" between a U.S. carrier and a foreign affiliate with market power involving the provision of basic services, including pricing and routing arrangements.[10]

A. The Proposed Application Of The No Special Concessions Rule Would Violate The National Treatment And Most-Favored-Nation Principles Of The GATS

The FCC's proposed interpretation of its "no special concessions" rule misses the point of the GATS' market liberalization plan. Under the WTO agreement, the United States has committed itself to opening its market for international telecommunications services on a non-discriminatory basis to carriers from WTO member countries. In return for this commitment, other WTO members have made similar pledges. As GTE Service Corporation said in its comments, "the GBT Agreement represents a series of parallel commitments to liberalize telecommunications markets in specific ways. It does not represent an undertaking to

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8 See Foreign Participation Notice ¶¶ 114-18; 47 C.F.R. § 63.14.

9 See Foreign Participation Notice ¶ 115.

10 See id. ¶ 117.

harmonize the regulatory standards or legal regimes applicable in the GBT member countries . . . ."[11] Nevertheless, the FCC appears ready to exclude the competitive offerings of some carriers from WTO countries based on the criterion of market power, which essentially requires that the home country have an existing market structure for international services identical to that which exists in the United States.

This no special concessions proposal would thus single out carriers based on market power — in spite of the commitments of WTO countries to open their markets — in their home country. Such a rule, in addition to requiring the FCC to make "administratively burdensome" determinations concerning market power,[12] would violate the GATS' National Treatment Principle by according non-foreign-affiliated domestic carriers the right to enter into arrangements which are prohibited for certain foreign-affiliated carriers.[13] And because the proposed rule has the potential of distinguishing among carriers based on their market power, or lack thereof, in order to deny certain benefits to carriers from some of those countries, the no special concessions requirement also would violate the GATS' Most-Favored-Nation principle.[14] TI therefore agrees with France Telecom that "[m]arket power should not be an

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[11] GTE Comments at 3.

[12] See BT North America Comments at 5 n.6.

[13] See GATS art. XVII(1) ("[E]ach Member shall accord to services and service suppliers of any other Member . . . treatment no less favourable than that it accords to its own like services and service suppliers."). For example, U.S. local exchange carriers, though unquestionably dominant in their local service areas, are not subject to a "no special concessions" rule in the provision of long distance services with affiliated carriers in the U.S. or at foreign points. See also Deutsche Telekom Comments at 10-11.

[14] See id. art. II(1) ("[E]ach Member shall accord . . . to services and service

issue of concern to the FCC for carriers whose home markets are bound open as a matter of law to competition . . . ."[15]

Other WTO countries have taken a more open approach to market liberalization. Australia, for instance, recently enacted new legislation that provides open entry for foreign carriers regardless of market power in their home countries. There is no indication that the new Australian Communications Authority will impose any post-entry safeguards concerning market power abroad; rather, competitive abuses will be dealt with on a case-by-case basis by the Australian Competition and Consumer Commission (ACCC). The FCC should recognize the legal and practical necessity of taking a similar course in opening the U.S. market under the terms of the WTO agreement.

B. The Proposed Rule Is Inconsistent With The New Accounting Rate Flexibility Policy

The proposed "no special concessions" requirement is inconsistent with other parts of the Foreign Participation Notice which propose that there be a presumption in favor of alternative settlement arrangements among U.S. carriers and carriers from WTO member countries.[16] In the Foreign Participation Notice, the Commission states that "we believe that the commitments to competition and fair regulatory principles in the WTO Basic Telecom Agreement will substantially lessen the ability of foreign carriers with market power to

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and service suppliers of any other country.").

[15] France Telecom Comments at 21.

[16] See Foreign Participation Notice ¶ 152.

discriminate among U.S. carriers."[17] The Commission goes on to adopt a rebuttable presumption that "flexibility is permitted for carriers from WTO member countries."[18] Nevertheless, in the same document the Commission proposes not to allow such flexibility for foreign carriers from WTO countries with "market power" — in spite of the fact that the market liberalization commitments of WTO countries (even those where a carrier may have market power) greatly reduce the risk of discrimination against U.S. carriers in those countries. Given the inconsistency of these two positions, the flawed logic of the Commission's no special concessions requirement is apparent.

The no special concessions rule is also inconsistent with the general purposes behind the Commission's ISP flexibility policy. For instance, the Commission itself has acknowledged that strict adherence to the ISP — which it now proposes in the form of its no special concessions rule — can hinder competition and that flexibility is therefore necessary. The Commission said the following in its Flexibility Order concerning the implementation of ISP flexibility:

> Commenters who argue for a delay in implementing our ISP flexilibity policy ignore the anticompetitive implications of the ISP, including the ways that it may discourage emerging competition. We believe that a more flexible framework that allows for relaxing regulatory rules and removing entry barriers will best support the development of competitive market structures and deliver the benefit of such structures to consumers.[19]

The need for flexibility, in light of the anticompetitive nature of the ISP, is even more apparent

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[17] Id. ¶ 148.

[18] Id. ¶ 150.

[19] Flexibility Order ¶ 26.

given the legal dictates of the WTO agreement.

For these reasons, the Commission should eliminate its proposed "no special concessions" rule altogether for carriers from WTO member countries. Alternatively, the Commission should: (1) make the rule inapplicable to carriers that face facilities-based international competition;[20] and (2) make an exception to the rule where an exclusive arrangement has been approved pursuant to the new ISP flexibility policy.[21]

III. The Benchmark Settlement Conditions Are An Impermissible Prior Entry Restraint And Should Be Eliminated

The Commission's proposal to grant Section 214 authority to foreign (or foreign-affiliated) carriers on condition that any service to their home country complies with the Commission's proposed accounting rate benchmarks[22] would impermissibly restrict the entry rights of carriers from WTO countries.[23] Article XVI of the GATS requires that signatories

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[20] See BT North America Comments at 5; MCI Comments at 6-7; KDD Comments at 13-14.

[21] This latter modification in the proposed rule is also supported by NYNEX LD and France Telecom. See NYNEX LD Comments at 3-5; France Telecom Comments at 20-21.

[22] See generally Benchmarks Notice. On August 7, 1997, the Commission adopted an order in the Benchmarks proceeding formally establishing accounting rate benchmarks for approximately 65 countries. Commission Adopts International Settlement Rate Benchmarks, Report No. IN 97-24 (released Aug. 7, 1997). Application of these benchmarks to carriers from WTO countries as a condition of their authority in the United States is still under consideration in this docket.

[23] See, e.g., Telefónica Internacional de España Comments at 12-14; Deutsche Telekom Comments at 7-16; Viatel Comments at 7-9. In the Benchmarks proceeding, TI's parent, Telstra Corporation, filed comments opposing the FCC's proposed accounting rate benchmarks for policy reasons. Upon further review, TI now opposes the benchmarks as a violation of U.S. treaty obligations under the GATS.

not restrict carriers from other WTO members from gaining access to their markets.[24] TI agrees with Viatel that the proposed benchmark conditions, though characterized as "post-entry" safeguards, are in fact pre-entry market access restrictions.[25] Because the U.S. Schedule of Commitments did not specify such restrictions, their implementation would clearly violate the market access provisions of the GATS, thus subjecting the United States to WTO dispute settlement proceedings and U.S. carriers to retaliatory restrictions abroad.

Perhaps the most telling aspect of this benchmark pre-entry condition is that its implementation could, based on current accounting rates, bar foreign carriers from approximately 90% of WTO countries from serving their home country.[26] Such a provision directly contravenes the language of the GATS' market access requirements. Common sense also suggests that such a result could not have been intended by U.S. negotiators, let alone their foreign counterparts, in drafting their GATS Schedules of Commitments. Indeed, the

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[24] GATS art. XVI(1) ("With respect to market access . . . each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule."). The United States did not specify in its Schedule of Commitments the market access restrictions proposed in this docket by the FCC.

[25] See Viatel Comments at 7-8.

[26] See Telefónica Internacional de España Comments at 12-13. There are 129 members of the WTO apart from the United States and the European Communities. (The EC is not included here for analytical purposes because its member states have their own accounting rates with the United States.) Of these 129 countries, only nine currently have accounting rates that would satisfy the benchmarks imposed by the order in the Benchmarks proceeding. See Commission Adopts International Settlement Rate Benchmarks, supra note 22, at 2 (discussing the benchmarks of 15¢, 19¢ and 23¢ imposed on countries depending on their level of income); FCC, Consolidated Accounting Rates of the United States (July 1, 1997) (listing the accounting rates for more than 230 countries).

U.S. now stands alone in seeking to implement its WTO commitments in such a non-conforming fashion.

Although the United States is not alone in having an accounting rate deficit or in its concern about the market power of foreign carriers, other countries, including such major telecom trading partners as Australia, Japan and all of the European Union states are, to our knowledge, opening their markets unconditionally to U.S. and other carriers from WTO countries.[27] Australia, for instance, has enacted new legislation which, as discussed above, allows foreign carriers to enter the Australian market freely and without the imposition of any benchmarks or other "safeguards" similar to those which the FCC has proposed. Any competitive abuses in Australia will be dealt with on a case-by-case basis by that country's competition authority, the ACCC. Germany and Japan have taken similar approaches and will not impose accounting rate benchmarks.

Rather than create new market entry barriers in the form of benchmark settlement rates or limit the competitive offerings of foreign carriers through a "no special concessions" requirement,[28] the Commission should take a page from its allies (who have largely followed the United States' strong rhetorical stance in favor of market liberalization) and rely on general competitive safeguards and antitrust law. That would plainly be consistent with the regulatory Reference Paper the U.S. has championed and the GATS' MFN and National Treatment principles. It would also ensure a larger pool of competitors in the U.S. market for

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[27] See Deutsche Telekom Comments at 2, 6; KDD Comments at 1-2; France Telecom Comments at 7-8.

[28] See supra note 15 and accompanying text.

international services, and a wider array of service offerings (including one-stop shopping) for U.S. consumers.

In so doing, the FCC also is more likely to achieve its goal of cost-based accounting rates through extensive competitive entry for U.S. and other carriers in WTO countries, driving calling rates and settlements toward cost through aggressive competition.[29] In addition, such an approach would help to shield the United States from WTO dispute settlement actions and U.S. carriers from retaliatory measures that could result from the FCC's "competitive safeguards." But pre-entry conditions in the United States are likely to stifle enhanced competition and the enthusiasm for open markets that we currently see around the globe.

IV. Amended Public Notice Rules Are Necessary To Ensure That The New Competitive Regime Is Fairly Administered And Protects The Due Process Rights Of All Interested Parties

As TI stated during the initial comment round, in a liberalized market there is a need for some housekeeping measures to ensure that all carriers are treated fairly.[30] Specifically, the Commission should update and harmonize its notice procedures regarding carrier petitions for variance of the ISP. As pointed out, a petition seeking a declaratory ruling to implement an alternative settlement arrangement under Section 64.1002(a) of the Commission's Rules is subject to public notice requirements under the Flexibility Order, while ISP modification requests under Section 64.1001(f) of the Commission's Rules are not subject to public notice.

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[29] MCI rightly points out that the proposed competitive safeguards could expose the United States to the risk of retaliatory safeguards by other WTO members, thus subjecting U.S. carriers to "debilitating retaliatory regulation overseas." MCI Comments at 6.

[30] See TI Comments at 5-9.

There are already at least 170 facilities-based carriers in the United States, and, to our knowledge, there is currently no FCC or other database that would allow these carriers to determine what other carriers provide service along the same routes. Thus, rather than impose the burden on carriers seeking ISP relief to serve all other carriers along their route with notice of the request, the FCC alone should bear the burden of placing all such petitions — whether filed under Section 64.1001 or 64.1002 — on public notice. This is prudent not only because petitioning carriers may be unaware of other carriers providing service along the relevant route, but also because the FCC's resolution of a request, due to its force as precedent, could affect the rights of carriers that have not yet begun providing service. Hence, the due process rights of all carriers and the pro-competitive goals of the Foreign Participation Notice justify this important housekeeping measure.

V. Conclusion

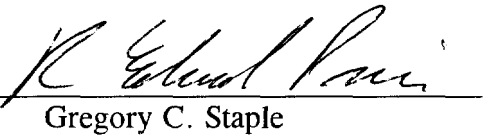
TI supports the Commission's proposal to discontinue application of its ECO test for carriers from WTO member countries. This is consistent with U.S. obligations under the GATS and has the potential to bring great benefits to U.S. consumers. But as nearly all of the commenters in this proceeding have pointed out, the proposed competitive safeguards — primarily the "no special concessions" requirement and accounting rate benchmark condition — would thwart many of the anticipated benefits of liberalization and are inconsistent with the United States' Market Access, MFN and National Treatment obligations under the GATS.

For these reasons, effective and legally sound market liberalization in the United States requires that the Commission either abandon its "no special concessions" proposal or, alternatively: (1) make it inapplicable to carriers that face facilities-based international

competition; and (2) make an exception to the rule where an exclusive arrangement between a U.S. carrier and its foreign affiliate has been approved pursuant to the new ISP flexibility policy. The Commission should also eliminate its proposed benchmark entry condition, which could deprive U.S. consumers of competitive service offerings by carriers from approximately 90% of WTO countries. Instead, the Commission should rely on general competitive safeguards and antitrust law to ensure fair competition, just as Australia and many other WTO countries will do.

Respectfully submitted,

TELSTRA, INC.

By 

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August 12, 1997

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing "REPLY COMMENTS OF TELSTRA, INC." were sent this 12th day of August, 1997, via U.S. Mail, postage prepaid, or hand delivered (*) to the following persons:

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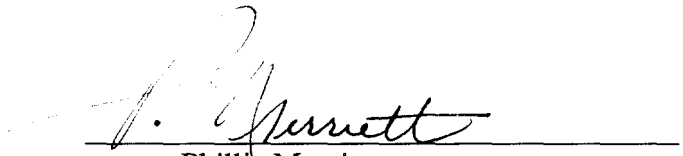
Arlington, VA 22204
For the Secretary of Defense



Phillis Merriett